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In the Supreme Court of the United States

No. 469.

OCTOBER TERM, 1960.

THOMAS W. ALEXANDER,

Petitioner,

vs.

BUCKEYE CELLULOSE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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vs.

BUCKEYE CELLULOSE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on July 18, 1960.

OPINIONS BELOW.

The opinion of the District Court is not reported. The opinion of the Court of Appeals has not been reported at this time. The opinions are reproduced.

JURISDICTION.

The judgment of the Court of Appeal was entered on July 18, 1960. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

This is an action in the U. S. District Court in Tennessee by a citizen of North Carolina against a corporation under the laws of Ohio domesticated in Tennessee on a merger agreement which, as alleged in the amended complaint,

> "provided the defendant Buckeye Cellulose Corporation should be the Continuing Corporation and that as Continuing Corporation all liabilities of the Constituent Corporations should attach to it."

The merger agreement was executed in accord with the statute of Ohio dealing with the merger of corporations. The original liability of the Corporation which petitioner says was included in the provision quoted above, accrued under the laws of Florida, and both the District Court and the Court of Appeals held the remedy on the original liability barred by a three-year Florida Statute of Limitations, and further held that the merger agreement had no legal significance, the Court of Appeals stating in its opinion that there was no intent on the part of the parties that the merger agreement should be a new promise and create responsibility.

STATUTE INVOLVED.

Title 28, United States Code, Sec. 1652, 62 Stat. 944. provides as follows:

> "The laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

RULE INVOLVED.

Rule 19 (b) of this Court is also basis of this petition.

STATEMENT OF THE CASE.

This action was brought in January 1958 by Thomas W. Alexander (hereinafter called the Petitioner) against Buckeye Cellulose Corporation, an Ohio corporation (hereinafter called the Corporation) to recover for services rendered the Corporation. There was a demand for a jury allowed by the District Court.

Liability for the services had been denied by a letter written in Florida in February 1952 and a cause of action arose then and there. Both courts held a three-year Florida Statute of Limitations set up as a defense applied. The complaint was amended on March 11, 1959, prior to the decision of the District Court, to allege that in October 1955 a cause of action arose because the Corporation executed a merger agreement which

> "provided the defendant Buckeye Cellulose Corporation should be the Continuing Corporation and that as Continuing Corporation all liabilities of the Constituent Corporations should attach to it."

The Corporation contended that the merger agreement created no responsibility or new promise, relying on Ohio Code Sec. 1701.81 and also *Board of Commissioners of Caddo Levee District vs. Pure Oil Company*, 167 La. 801, 120 So. 373 (1929).

The District Court granted summary judgment for the Corporation on the ground that the Florida three-year Statute of Limitations was a conclusive defense. The Court of Appeals affirmed, saying:

> "The only case in which a problem similar to the present problem was found was Board of Commissioners of Caddo Levee District vs. Pure Oil Co., 167 La. 801, 120 So. 373 (1929) which reached the same result as the District Court in this case. The finding of a new promise to pay which would start the Statute of Limitations running again must necessarily be dependent

upon the intent of the parties. Even the plaintiff in this case does not contend that the parties to the merger intended that the resultant corporation should be responsible for any debts except those for which the prior companies were legally liable."

REASONS FOR GRANTING THE WRIT.

First. The opinion in this case, though a jury was demanded, is that the "intent" of the merger agreement is a question of law. The Court disposed of the case by holding that the parties did not intend to include the "revival" of the obligation within the terms of the merger agreement. This is in conflict with this Court in two cases: *American Stevedores, Inc. v. Porello*, 330 U. S. 346 (at p. 458), and *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation*, 350 U. S. 124 (at p. 144). Not only is the opinion contrary to the holdings of this Court, it conflicts with the holding of the Court of Appeals for the Third Circuit in the case of *Renault v. L. N. Renault & Co.*, 188 Fed. 2d. 317, where "intent" was held for a jury.

Second. The opinion is in conflict with *Leyman Corp. v. Piggly-Wiggly Corp.*, 90 Ohio Appeals 506; 103 N. E. 2nd 399. There the Ohio law is stated. The holding is significant because the Court found that the obligation sued on *was valid though unknown to the assuming party* at the time of the assumption agreement. The case is summed up on the 1954 Supplement to *Restatement of Contracts*, Section 139 at p. 365, where the statement is made that an agreement created an assumption "notwithstanding such lease was not a liability in contemplation when the debts of lessee were assumed * * *." Standard law encyclopedias say that intent is a question of fact. 88 *C. J. S.*, Trials. C. 219, p. 502 and 53 *Am. Jur.*, Trial, S. 219.

Third. The opinion concludes that the "merger agreement required the Buckeye Cellulose Corporation to pay only those obligations which were legally enforceable at the time of the merger." The conclusion is that the Florida three-year statute destroyed, extinguished or wiped out the obligation. We submit it did not do so. No Florida case was cited to support this conclusion. The Court of Appeals relied on a Louisiana case, *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801; 120 So. 373. Our insistence is that the law of Florida is not that its Statute of Limitations extinguishes an obligation. A Florida decision which holds the statute does not extinguish an obligation is *Danielson v. Line*, 185 So. 332; 135 Fla. 585. That case states that the law in Florida with respect to the Statute of Limitations does not extinguish the obligation. "It in no wise affects the debt or obligation * * *." Furthermore, in the Florida case of *Courtlandt Corp. v. Whitmer*, 121 So. 2d 37, decided June 1st, 1960, there is a closely reasoned discussion of this question of extinguishment. It again indicates that an obligation is not extinguished by the Florida Statute of Limitations.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

JAC CHAMBLISS,
1111 Maclellan Building,
Chattanooga, Tennessee,
Attorney for the Petitioner.

October 3, 1960.

APPENDIX.

MEMORANDUM OPINION OF DISTRICT COURT.

(Filed April 13, 1959.)

Several motions are before the Court in this case. The motion for summary judgment filed by the defendant will be discussed first.

The defendant offers a number of reasons why a summary judgment should be granted to it. It is sufficient to consider only one proposition to determine the motion.

The defendant asks for a summary judgment because the suit is barred by the Tennessee statute of limitations. The services of the plaintiff on which this suit is based were performed more than six years prior to the bringing of this suit. The plaintiff seeks to overcome this admitted fact by claiming first that defendant had an implied contract to pay him, by making him chief forester and wood procurer of the new operation, and the statute began to run in February, 1952, when that contract was broken; and second that the merger of the defendant with the Buckeye Cotton Oil Company created a novation, or new contract, and this started a new running of the statute of limitations.

The second of these contentions is clearly without merit. Although the word "novation" is sometimes used by the courts in describing the rights of creditors against consolidated corporations, see 14a, C. J. 1073, 19 C. J. S. 1394, the meaning is not used in its technical sense—as the establishment of a new contract—but means only that the new corporation is liable for the old debts, no more and no less.

Most important to the first contention is the effect of the Tennessee Code Annotated, Section 28-114, which reads:

> Where the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein, while the party to be charged was a resident in such state or such government, the bar is equally effectual in this state.

All of the services sued for were performed in Florida. The cause of action therefore accrued in Florida far more than three years before this suit was filed, and the Florida statute of limitations is three years. The defendant could have been sued in Florida at any time since the accrual of the right, the defendant having been in business there ever since the rendering of the services which are the subject of this suit. In other words, the Tennessee period of limitations in this case is, by derivation from the Florida law, three years, not six, and the precise time when the statute began to run is therefore of no importance, because there is no controversy about the fact that the cause of action accrued more than three years prior to the filing of this suit.

The defendant's motion for summary judgment is granted. The fact that this motion is granted makes all other motions of no significance.

Order accordingly.

LESLIE R. DARR,
United States District Judge.

MEMORANDUM TO CLARIFY OPINION.

(Filed May 7, 1959.)

The original opinion passing on the defendant's motion for summary judgment in this case failed to specifically pass on the other motions pending. This memorandum is written to clarify that point.

The plaintiff's motion to amend the complaint to add a statement regarding the merger of the Buckeye Cellulose Corporation with the Buckeye Cotton Oil Company is granted, the merger having been considered in the factual background on which the original opinion is based.

The defendant's motion for summary judgment having been granted, all other motions are now denied.

LESLIE R. DARR,

United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided July 18, 1960.)

Before SIMONS, Senior Circuit Judge, POPE, Circuit Judge, and KENT, District Judge.

KENT, District Judge. This is an appeal from the entry of a summary judgment for the defendant by the District Court.

The plaintiff was employed by the Buckeye Cotton Oil Company and performed services which terminated prior to February, 1952. This suit was instituted to recover payment for such services. The suit was commenced on January 31, 1958, by the filing of a complaint in the United States District Court for the Eastern District of Tennessee. The defendant company was merged with the Buckeye Cotton Oil Company by an agreement of merger dated October 28, 1955. Both corporations were organized under the laws of the State of Ohio. The defendant relies upon the three year statute of limitations applicable to such actions as this, under the laws of the State of Florida, and also upon Section 28-114, Tennessee Code Annotated, which provides:

> "Where the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein while the party to be charged was a resident in such state or such government, the bar is equally effectual in this state."

The District Court held that under the above provision of the Tennessee Code plaintiff's cause of action was barred, the cause of action having accrued in Florida, and applied the Florida three year statute of limitations, and entered summary judgment for the defendant.

Plaintiff contends that the merger agreement between the Buckeye Cotton Oil Company and the Buckeye Cellulose Corporation, which required Buckeye Cellulose Corporation to assume all the liabilities and obligations of the Buckeye Cotton Oil Company was a new promise which obligated the Buckeye Cellulose Corporation to pay the debts of the Buckeye Cotton Oil Company even though the right to recover for such debts may have been previously barred by the applicable statute of limitations.

At the time of the arguments in this Court, plaintiff's counsel conceded that the District Judge was correct in concluding that plaintiff's cause of action was barred by the Florida statute of limitations, and the Tennessee statute set forth above, unless such cause of action was "revived" by the merger agreement.

There have been some instances in which a merger prior to the running of the limitations period has been held to toll the statute of limitations on the basis that a new promise to pay has been found. *Mitchell v. Liberty Clay Products Co.*, 291 Pa. 282, 139 A. 853.

The only case in which a problem similar to the present problem was found was *Board of Commissioners of Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373 (1929), which reached the same result as the

District Court in this case. The finding of a new promise to pay which would start the statute of limitations running again must necessarily be dependent upon the intent of the parties. Even the plaintiff in this case does not contend that the parties to the merger intended that the resultant corporation should be responsible for any debts except those for which the prior companies were legally liable.

This Court is in complete accord with the conclusions reached by District Judge Darr, that the merger agreement required the Buckeye Cellulose Corporation to pay only those obligations of its predecessors which were legally enforceable at the time of the merger.

The judgment of the District Judge is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed July 18, 1960.)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ W. WALLACE KENT,

United States District Judge.

(Sitting by designation.)

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IN THE

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No. [redacted] 469

THOMAS W. ALEXANDER,

Petitioner,

v.

THE BUCKEYE CELLULOSE CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1960

No. [redacted]

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THE BUCKEYE CELLULOSE CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

COUNTER-STATEMENT OF QUESTION PRESENTED

Respondent is somewhat uncertain, even after a careful study and review of the Petition for Writ of Certiorari, as to precisely what question it is that Petitioner asks this court to review. No question is either expressed or suggested by the two paragraphs comprising that section of the Petition headed "QUESTIONS PRESENTED," found on Page 2 of the Petition. However, by inference drawn from a reading of paragraphs First and Second of that section of the Petition headed "REASONS FOR GRANTING THE WRIT," found on Page 4, Respondent believes that it must be the following question on which certiorari is sought by Petitioner:

"Were the District Court and the Court of Appeals for the Sixth Circuit correct in concluding that the Respondent did not, as the continuing corporation of a merger in which The Buckeye Cotton Oil Company and the Respondent were constituent corporations, implicitly assume and thus "revive" an alleged claim with respect to which recovery was already barred by limitations at the time of merger and the existence of which was unknown to respondent at the time of merger?"

RESPONDENT'S POSITION

It is Respondent's position that the District Court and the Court of Appeals were quite correct in their ruling on the question stated above. Of even greater importance in connection with the Petition submitted to this court, Respondent respectfully submits that this case presents no question of paramount public importance of the character of which this court should be asked to reveiw. This case involved nothing other than a determination of contractual rights and obligations of two private parties (or perhaps more accurately, the absence of any such rights and obligations) and the application of a statute of limitations and a merger statute with which both the District Court and the Court of Appeals were thoroughly familiar.

STATUTE INVOLVED

Respondent is unable to understand exactly why Petitioner feels that Title 28, U. S. Code Section 1652, 62 Stat. 944, should be called to the attention of the court in this Petition for Writ of Certiorari. Respondent believes that if any statute is involved in this petition, it is Section 1701.80 of Title 17 of the Ohio Revised Code, describing the effects of a merger in the State of Ohio. Section 1701.81 of Title 17 of the Ohio Revised Code is quoted in its entirety in Appendix A of this brief.

COUNTER-STATEMENT OF THE CASE

The following facts, correcting and supplementing those outlined in the Petition, should be brought to the attention of the court for a more complete understanding of the nature of the action, the position Petitioner has taken with regard to the effect of the merger between The Buckeye Cotton Oil Company and the Respondent, and the decisions of the District Court and the Court of Appeals:

1. This action, filed by Petitioner on January 31, 1958, sought recovery of compensation under an implied contract to pay for negotiating services allegedly rendered by Petitioner at Respondent's request. It has not been and is not "an action on a merger agreement," as Petitioner characterizes it in his statement of QUESTIONS PRESENTED.

2. Petitioner has claimed that the alleged negotiating services were beyond the scope of the normal services of a consulting forester which Petitioner contracted to perform under a Letter Agreement of October 6, 1950, which were performed by Petitioner, and for which Petitioner was paid in full the compensation fixed in the Letter Agreement.

3. As all services of any character performed by Petitioner for Respondent were completed prior to February, 1952, and Petitioner was advised of the termination of his retainer arrangement in a letter written by Respondent in February, 1952, the District Court concluded that Petitioner's cause of action, if any existed, must have accrued at a date no later than the end of February, 1952, and inasmuch as the applicable limitations period of three years had expired long before suit was filed in 1958, recovery on any claim which Petitioner might have had was barred.

4. Following oral argument on Respondent's Motion for Summary Judgment, in which Respondent urged a three-year limitations period, Petitioner amended his Complaint, pleading the fact of merger of The Buckeye Cotton Oil Company and the Respondent in October, 1955 and took the position that the Respondent, as the surviving corporation succeeding to the assets and liabilities of the constituent corporations in the merger, created a new promise by operation of law with respect to the Petitioner's claim, thus making any such claim legally enforceable, *even though the existence of any possible liability to Petitioner was unknown at the time of merger and any such claim had already been barred by the applicable statute of limitations.*
5. At no time during the proceeding before the District Court or before the Court of Appeals did the Petitioner contend that the existence of the claim for extra compensation now asserted was known to either The Buckeye Cotton Oil Company or the Respondent at the time of merger or at any time prior to the filing of suit on January 31, 1958. Accordingly, the Petitioner has never suggested, until the filing of this Petition for Writ of Certiorari, that the constituent corporations in the merger, The Buckeye Cotton Oil Company and the Respondent, could have possibly intended that the latter's assumption of the liabilities of the former included this particular claim of Petitioner which was, if it existed at all, unenforceable by reason of the bar of the statute of limitations.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. There Are No Special or Important Reasons for Review of Any Question Presented in This Cause on Writ of Certiorari.

It is, of course, within the discretion of this court to review questions on Writ of Certiorari as it deems them appropriate for review. However, in line with a legion of past decisions of this court and as expressly provided in *Rule 19. Supreme Court Rules*, this court will grant Writ of Certiorari only when there are special and important reasons for exercising its discretion to review. No such reason exists for review of any question presented in this case.

This case presents no question of conflict of decision between or among courts of appeal, no important state or territorial questions, no question of Federal law, and no decision in conflict with applicable decisions of this court. The case involves nothing other than a determination as to whether a claim based upon an implied contract between private parties has been barred by the applicable statute of limitations.

Petitioner attempts to create a question for review by this court through the simple device of reading into the decision of the Court of Appeals a holding that the Court of Appeals did not make. The Court of Appeals did not, as Petitioner suggests, hold that the intent of the parties with respect to an agreement of merger is a question of law. The Court of Appeals merely held that the provision in the Ohio Merger Statute which provides that a continuing corporation assumes, by operation of law, the liabilities of the constituent corporation in the merger, could not be construed to include a claim, unenforceable by reason of limitations, *absent* evidence that the parties recognized the existence of the barred claim and intended that it be revived as an obligation of the surviving corporation. The Court of Appeals went on to point out that not only was there no evidence of such an intent on the part of the constituent corporations of this merger, but Petitioner had never contended that either of the parties to the merger intended that it be revived and assumed by the surviving corpora-

tion. Any other decision by the District Court or the Court of Appeals would have the absurd result of holding that every merger of Ohio corporations operates to revive all claims barred by the statute of limitations, no matter how ancient, which may have existed against any of the constituent corporations and making such stale claims legally enforceable against the surviving corporation.

The Court of Appeals decision is not in conflict with the two decisions of this court cited by Petitioner: *American Stevedores Inc.* v. *Perello*, 330 U. S. 446, and *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.*, 350 U. S. 124. Both of these cases involved an action by a longshoreman for injuries sustained against the owner of the vessel on which the longshoreman was working when injured and in which the shipowner sought contribution from the stevedoring contractor employing the longshoreman as a joint tort feasor. In the *American Stevedores* case, an express indemnity agreement was pleaded and this court, finding the indemnity agreement ambiguous, held that evidence concerning the intention of the parties with respect to the indemnity should be considered by the District Court. In the *Ryan Stevedoring Co.* case, no express agreement of indemnity was present, but the court found an implied agreement to indemnify, and Justice Black, in a dissenting opinion, felt that the *American Stevedores* case at least required the court to send the case back to the trial court to determine the facts with respect to the intention of the parties on the question of indemnity.

There is no similarity in these decisions and the case at bar, for the scope of the indemnity in these cases was very much in issue and intent of the parties with respect to indemnity was relevant to this issue pleaded and urged by the parties. In the case at bar, however, the Petitioner has never contended that the constituent corporations in the merger even knew of the existence of Petitioner's claim at

the time of merger, much less having any "intention" to waive the benefit of the statute of limitations which had already made the claim, if any existed, legally unenforceable.

The decision of the Court of Appeals is in no way in conflict with the decision of the Court of Appeals for the Third Circuit in the case of *Renault* v. *L. N. Renault & Sons, Inc.*, 188 F. 2d 317, for the very same reason that the intent of one of the parties in issuing a check (the question being whether issuance of the check represented a partial payment with respect to an obligation which, absent the partrial payment, would be barred by the statute of limitations) was a vital issue in the case, pleaded and urged by the litigants, and the Court of Appeals concluded that there was sufficient evidence on the question of intent to submit that question to the jury.

Petitioner further argues that the decision of the Court of Appeals is in conflict with *Lehman Corporation* v. *Piggly Wiggly Corporation*, 103 N. E. 2nd 399, because, according to the Petitioner, the Hamilton County Court of Appeals construed the "law of Ohio" in a manner contrary to the construction of the Court of Appeals for the Sixth Circuit in the case at bar. Precisely wherein this supposed conflict lies is not stated by the Petitioner. The *Lehman* case involved the purchase of all of the assets and the assumption of all of the obligations and liabilities by a parent corporation of its subsidiary corporation. One of the obligations of the subsidiary corporation at the time of purchase by the parent was an outstanding lease of premises from the plaintiff's assignor, although this lease was not shown on the books of the subsidiary corporation and it was conceded that the parent corporation was not aware of the existence of the lease at the time of purchase. The decision of the Hamilton County Court of Appeals was nothing more nor less than a finding of transferee

liability in a case involving the purchase of all of the assets of one corporation by another, and an attempt by the purchasing corporation to deny liability to a claimant against the selling corporation. No question of "revival" of a claim barred by the statute of limitations was involved and the case did not involve a construction of the Ohio statute relating to mergers. The following statement of the court points up the holding in the case:

> "When Piggly Wiggly Corporation took possession of and title to the assets of Piggly Wiggly Stores, Inc., which upon its dissolution had become a trust fund, without paying anything therefor, it became a constructive trustee for the benefit of all those having *enforceable claims* against Piggly Wiggly Stores, Inc." (Emphasis ours.)

The effect of a succession of one corporation to the assets and business of another is a concomitant assumption of existing liabilities of the predecessor corporation, but no court, to our knowledge, has ever held that a corporation succeeding to the assets and business of another, whether by outright purchase, merger, or consolidation, assumes a new obligation to all past creditors of the predecessor corporation whose claims have been barred by the statute of limitations.

II. Petitioner Is Not in a Position to Contend for the First Time in This Petition That the Parties to the Merger Agreement "Intended" to Revive His Claim.

If it is now Petitioner's contention that The Buckeye Cotton Oil Company and Respondent, at the time of merger, recognized Petitioner's barred claim and intended that a new promise to pay it be made by Respondent as a part of the merger, this marks the first time this contention has been made. In the Court of Appeals, Petitioner urged that his claim was "revived" *by operation of law* as a result of

the merger. There was not the slightest suggestion that Petitioner claimed the parties *actually intended* to revive the claim; had this suggestion been made, the Court of Appeals would have refused to consider it as this contention was neither pleaded nor urged in the District Court. A new issue, not raised in the pleadings in the District Court or considered by it, cannot be raised for the first time on appeal. *Henry B. Walker, Jr.* v. *Felmont Oil Corporation*, C. C. A. 6, 1958, 262 F. 2d 163. And it is perfectly clear that this court will not consider a question not raised or passed upon in the District Court or the Court of Appeals. We cite only a few of numerous decisions of this court confirming this fundamental rule of appellate practice. An early statement of this rule is set forth in *Springer* v. *United States* (1880), 102 U. S. 586, wherein the court stated at page 593, "The point was not brought to the attention of the Court below and cannot, therefore, be insisted upon here." See also *Virtue* v. *Creamery Package Mfg. Co.* (1912), 227 U. S. 8; and *Becher Steel Company of America* v. *Cummings*, Atty. General (1935), 296 U. S. 74.

III. The Court of Appeals Did Not Hold, as Asserted by Petitioner, That "the Florida Three-Year Statute Destroyed, Extinguished, or Wiped Out the Obligation," nor Was It Necessary for the Court of Appeals to Consider This Question.

The Court of Appeals concluded, as did District Judge Darr, that "the merger agreement required The Buckeye Cellulose Corporation to pay only those obligations of its predecessors which were legally enforceable at the time of the merger." Whether the effect of the applicable three-year limitations was to extinguish the alleged obligation or merely to bar the remedy is completely immaterial, and it is respectfully submitted that there is absolutely no

point in engaging in an academic discussion of this completely irrelevant question in this Petition. It makes no difference whatsoever whether the supposed claim was extinguished or the remedy was barred; either conclusion means that the claim was not legally enforceable at the time of merger. The decision of the District Court and the Court of Appeals represented merely a reaffirmance of the general principle stated in *Fletcher Cyclopedia of the Law of Corporations, Volume 15, Section 713*, as follows:

> "A corporation which becomes liable for the debts and obligations of another company through consolidation, merger or purchase of property ordinarily stands in the same position as the old company with regard to such liability, and when sued thereon may assert the same equities, rights and defenses as would have been available to such other company."

That an alleged claim has been barred by the applicable statute of limitations is certainly one of the defenses of a constituent corporation which becomes available to a surviving corporation in a merger.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied for the reasons that:

1. The petition presents no special or important reasons for review by this Court.
2. The reason for review urged by Petitioner raises an issue which was neither pleaded nor considered in the District Court or in the Court of Appeals.

Respectfully submitted.

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APPENDIX A

Effect of merger

FILE COPY

In the Supreme Court of the United States

No. 469.

OCTOBER TERM, 1960

THOMAS W. ALEXANDER,
Petitioner,

vs

BUCKEYE CELLULOSE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER.

The brief of counsel for the respondent calls attention to an uncertainty in the petition for certiorari. We may have been too brief, thinking that the cases we now refer to were so well known there was no need to refer to them.

1. We interpreted the Court of Appeals opinion as indicating concern as to intent because that Court said:

> "The finding of a new promise to pay which would start the statute of limitations running again must necessarily be dependent upon the intent of the parties."

That being the conclusion we insist that what that intent was is a question of fact. Therefore we referred to *Porello* just as the opinion later in *Ryan* did (350 U. S. at p. 144). Both held intent a question of fact. The Court of Appeals acted on it as though intent were a question of law.

2. The basis of our reliance on Title 28, U. S. C. 1652, 62 Stat. 944 is four opinions published in one volume all

decided within a span of fourteen days. The four are landmarks and as we interpret them emphasize the fact that it was error not to decide the case in accord with the local or applicable law as expressed by the Ohio case of the Hamilton County Court of Appeals, *Lehman Bros. v. Piggly-Wiggly Corp.*, 103 N. E. 2d 399. The cases are *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, *Six Companies of Cal. v. Joint Highway Dist.*, 311 U. S. 180, *West v. A. T. & T.*, 311 U. S. 223, and *Stoner v. N. Y. Life Co.*, 311 U. S. 464.

3. We referred to Rule 19(b) as a basis for the petition. That Rule appears to us to state that a petition may be granted on (a) conflict with this Court, (b) conflict with applicable decision of this Court and (c) departure from the accepted and usual course.

The conflicts and departure we rely on are the use of the Summary Judgment, Rule 56, to dispose finally of the case. There are three cases that deal solely with the practice under Rule 56. All three are landmarks, are well known and we say conclusive. These cases are: *Sartor v. Arkansas Natural Gas*, 321 U. S. 620, *Kennedy v. Silas Mason Co.*, 334 U. S. 249, and *Fountain v. Filson*, 336 U. S. 681. Not so compelling, but significant is *Begnaud v. White* (CA 6th), 170 F. 2d 323.

4. Argument in an attempt to bring out the effect of the point raised as to intent.

In the Common Law, by the late Justice Holmes, he seems to regard intent as questions of fact. On page 303 he says:

> "The very office of construction is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered. * * *"

He follows this on pages 334-335 with this statement:

> "The law means to carry out the intention of the parties, and, so far as they have not provided for the event which has happened, it has to say what they naturally would have intended if their minds had been turned to the point. * * *"

In the Ohio Statute set forth in the Appendix of Respondent the words "liability" or "liabilities" do not occur. However, the merger agreement appears to have intended to go beyond the requirement of the statute and the amended complaint alleged:

> "* * * the merger agreement provided the defendant The Buckeye Cellulose Corporation should be the Continuing Corporation and that as the Continuing Corporation all liabilities of the Constituent Corporations should attach to it, the plaintiff averring that said agreement was executed in October, 1955, and the plaintiff further averring that all liabilities of the Constituent Corporations are liabilities of the Continuing Corporation, the defendant herein * * *."

Those who drafted the merger agreement had the Ohio Statute before them. It is presumed they used the word "liabilities" with intent to broaden the agreement; they were aware of the discussion of the word in *Black's Law Dictionary* and in *Mayfield vs. First National Bank* (C.A. 6th), 137 Fed. (2d) 1013.

The case should not have been disposed of under Rule 56.

Respectfully submitted,

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